FOR ARGUMENT

No. 77-510

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW MEXICO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

REPLY BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-510

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW MEXICO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

REPLY BRIEF FOR THE UNITED STATES

---

1. A reader of the opening briefs in this case could understandably be left unsure of where the parties differ on the issues presented. There is no dispute about the applicability of the reserved water rights doctrine to national forests or about the legal dimensions of that doctrine. Moreover, New Mexico now acknowledges (Br. 8-9) that the United States enjoys certain reserved water rights in the national forests in general and in the Gila National Forest in particular. To the extent that minimum instream flows are necessary to protect the forest from fire, erosion or dessication of the watershed, the State appears to concede that the United States has a reserved right to minimum instream flows for those purposes (Br. 43-44 and n. 11, 51). Indeed, the State suggests that sufficient water is reserved to the national forests in New Mexico to ensure that they will "continue to exist—very much alive, serene and beautiful" (Br. 82).

While we welcome the State's concurrence on these points, the judgment of the New Mexico Supreme Court reflects no such concurrence. The State now says that "the United States is not barred from asserting that rights to minimum instream flows might be necessary for erosion control or fire prevention on the basis of the recognized purposes of watershed management and the maintenance of timber" (Br. 44 n. 11). The state district court, however, held that "the United States does not have rights to minimum instream flows based upon the purposes for which the Gila forest lands were or could have been withdrawn from the public domain" (A. 231), and that judgment was affirmed by the New Mexico Supreme Court.[1] The supreme court ruled that "minimum instream flows were not contemplated" among the purposes for which the Gila National Forest was created (A. 241).

It is this ruling, not the ameliorative words of the State's brief, that represents the decision below. This ruling is erroneous, and it must be corrected by this Court.

2. In view of the concessions made by the State with respect to the rights of the United States to reserved water for the protection and maintenance of the national forests, it is difficult to understand why the State has spent a major portion of its brief (Br. 23-42) in seemingly

[1]The State argues that the district court and the state supreme court did not mean to foreclose the United States from later arguing that it has a right to minimum instream flows for the protection of the national forests (Br. 44). We do not find any such qualification in the language of the opinions or the judgments below. And even if the State were willing to accede to such later claims, other parties, relying on the state court judgments, might not be so accommodating.

taking issue with our contention that to improve and protect the forest was among the purposes for which a national forest could be created.

This issue is in the case only because of the curious treatment of the Organic Act by the New Mexico Supreme Court. That court initially acknowledged that the Organic Act provided that a national forest could be created for three purposes, including "improving and protecting the forest" (A. 238). But later in its opinion, the court stated that the Gila National Forest was created only "to insure favorable conditions of water flow and to furnish a continuous supply of timber" (A. 241). The State in its brief appears to defend this discarding of "improving and protecting the forest" as an independent purpose for their creation (*e.g.*, Br. 8-9).

The State's interpretation of the "improve and protect" clause, as we understand it, is that "improving and protecting the forest" is a proper purpose for establishing a national forest only if it serves in turn one of the other two statutory purposes, providing timber and ensuring favorable water flows (Br. 34). To be sure, the forests were not intended to be protected and improved *in vacuo*. And, as we pointed out in our opening brief, the focus of the congressional debates on the Organic Act and its predecessors was the service the national forests could provide both in supplying timber and in regulating water flow from the mountain watersheds. Nonetheless, the presence of the "improving and protecting" purpose is important. It demonstrates the concern of Congress, both at the time of the passage of the Act and before, for conservation of the forests and their resources. By omitting any reference to the "improving and protecting" language in its final interpretation of the Organic Act, the New Mexico Supreme Court was able to dismiss the

reserved water claims based on the protection and management of the forest as "environmental and aesthetic concerns" (A. 241) that fell outside the scope of the Act as the court interpreted it.

We agree with the State that the federal government enjoys reserved water rights necessary to protect the forests from injury or destruction. We part company with the State when it claims that the federal government has no rights to reserved water sufficient to maintain a natural forest habitat in the national forests. The State contends that nothing in the Organic Act or any other contemporary legislation was intended to convert the forest reserves into federal game and fish reserves (Br. 45-48). This argument mischaracterizes our position. The reserved right to instream flows is claimed for the purpose of preserving a natural forest habitat, not for the creation of a protected game reserve within the forest. As we have shown in our main brief, Congress directed the Forest Service as early as 1899—and regularly after that time—to provide for the protection of the fish and game resources of the national forests, recognizing that the improvement and protection of the forests involved more than the cultivation of a tree farm and the provision of a water conduit.[2]

---

[2]In response to our contention that the statutory purpose of "securing favorable conditions of water flows" contemplates a minimum level of instream flow, the State has argued that Congress meant by this purpose to allow forest streams to be completely appropriated before they left the forest (Br. 67). This follows, the State says, from the congressional intent that the forest water be available to private appropriators. We submit that the congressional concern with preserving the forest streams as well as the forests (discussed in our main brief, pp. 37-40) demonstrates that Congress did not envision the national forests entirely deprived of any water flow.

3. The State further contends that the federal government's claims to reserved water rights are defeated by three federal statutes providing rights of way for private water users across federal lands.[3] The State argues that Congress intended by these statutes to leave the resolution of water rights on federal reservations entirely to state law and to abandon any federal water claims not recognized by state law (Br. 56-67).

This contention proves too much. If these statutes indeed provide for the disposition of all water rights on federal reservations pursuant to state law, then every one of this Court's reserved water rights decisions is incorrect. The reserved water rights doctrine demonstrates that the disposition of water rights on public lands was not left exclusively to state law.

Moreover, the statutes on which the State relies do not purport to abandon any federal claims to water for federal uses. The first statute, Section 18 of the Act of March 3, 1891, 43 U.S.C. (1970 ed.) 946, granted a right of way "through the public lands and reservations of the United States" to qualifying irrigation companies. A proviso to that Section states that the right of way shall not "interfere with the proper occupation by the Government of any such reservation," and that the right of way "shall not be construed to interfere with the control of water for irrigation or other purposes under authority of the respective States or Territories." The

---

[3]Section 18 of the Act of March 3, 1891, 26 Stat. 1101, as amended, 43 U.S.C. (1970 ed.) 946; Act of February 15, 1901, 31 Stat. 790, 16 U.S.C. (1970 ed.) 522, 43 U.S.C. (1970 ed.) 959; Forest Right-of-Way Act of 1905, 33 Stat. 628 16 U.S.C. (1970 ed.) 524. All three statutes were repealed by the Federal Land and Policy Management Act of 1976, Pub. L. 94-579, 90 Stat. 2793.

authorities cited by the State (Br. 57-58) make it clear that this proviso was intended to ensure that the right of way did not confer any ownership rights to water independently of state law. Similarly, the 1901 and 1905 Acts provided for rights of way across federal lands; they did not purport to govern the allocation of water rights. None of the right-of-way laws relied on by the State conferred any rights against the United States to either the lands or the waters in the national forests. Instead, the use of the waters in the national forests was left to determination either by state law or by "the laws of the United States and the rules and regulations thereunder." 16 U.S.C. 481.

In *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, this Court made it clear that general statutes providing that state law should govern the allocation of water rights do not bar the federal government from asserting its interests, even when those interests are inconsistent with state law. The Court noted two principles that limit the applicability of state prior-appropriation claims against the federal government. First, the Court held that appropriation rights conferred by state law are limited by the federal government's interest in ensuring the navigability of the nation's rivers. Second, with respect both to navigable and non-navigable streams, the Court observed (174 U.S. at 703):

> [I]n the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property.

The Court then considered Section 18 of the Act of March 3, 1891, the statute primarily relied on by the State in this case, and determined that neither that Act nor

other federal statutes providing that the disposition of water on federal lands should be governed by state law were intended to permit the appropriation of water from navigable streams "to such an extent as to destroy their navigability" (*id.* at 706). Such an interpretation, the Court held, "is to carry those statutes beyond what their fair import permits" and "is a construction which cannot be tolerated" (*ibid.*).

By parity of reasoning, the same statutes cannot be construed as congressional relinquishment of the federal government's right to the continued flow of the waters in a stream running through a federally owned reservation, "so far at least as may be necessary for the beneficial uses of the government property."[4]

4. The State's response to our claims of reserved water for recreation and stockwatering is, in essence, that while these might have been approved uses of the national forests at the time the Gila National Forest was created, they were not among the purposes listed in the Organic Act and therefore cannot support a claim for reserved water (Br. 73, 78).

We agree with the State that before a national forest could be created, one of the purposes expressly set out in the Organic Act had to be present. Beyond those necessary conditions, however, other purposes were envisioned for the national forests as well. As we noted in our main brief (Br. 43-61), at the time the Gila National Forest was created it was contemplated that the forest

---

[4]The State seeks to dismiss the *Rio Grande* case as applying only to navigable streams (Br. 64-65 n. 18). That reading ignores the passage quoted above (174 U.S. at 703), which applies both to navigable and to non-navigable streams. The federal government's rights, "as the owner of lands bordering on a stream" to the "continued flow of its water," apply to "every stream within [the State's] dominion" (174 U.S. at 702, 703).

would serve the additional purposes of recreation and controlled grazing. Because recreation and grazing were components that reflected "the nature of the federal enclave," *United States* v. *District Court for Eagle County,* 401 U.S. 520, 523, the United States should have been granted reserved water to serve those purposes. The State's proposed distinction between forest "purposes" and forest "uses" overlooks the fact that the Gila National Forest was expected, from the time of its creation, to serve these purposes as well as the purposes expressly set out in the Organic Act of 1897.

Congress early and repeatedly recognized that recreation and stockwatering were proper forest purposes. Besides the appropriations for protection of fish and game in the forests, which began in 1899 and have continued regularly since then,[5] Congress has since 1910 provided annually for the maintenance of grazing programs[6] and the construction of recreational facilities on the national forests.[7] In the wake of this unbroken line of congressional approbation, the passage of the Multiple-Use Sustained-Yield Act of 1960 was not, as the State now charges (Br. 79), an attempt by Congress to "rewrite

---

[5]Sundry Civil Appropriation Act of March 3, 1899, 30 Stat. 1074, 1095. This statute was re-enacted in substantially the same form in each of the next eight years. In 1907, the Agricultural Appropriations Act provided funds "to transport and care for fish and game supplied to stock the national forests or the waters therein." 34 Stat. 1256, 1270. This measure was re-enacted in substantially the same form every year thereafter through 1956. *E.g.,* 41 Stat. 706 (1920); 46 Stat. 408 (1930); 54 Stat. 548 (1940); 64 Stat. 665 (1950).

[6]Agriculture Department Appropriations Act of May 26, 1910, 36 Stat. 416, 430; see also, *e.g.,* 41 Stat. 710 (1920); 46 Stat. 410 (1930); 54 Stat. 548 (1940); 64 Stat. 666-667 (1950).

[7]Agriculture Appropriations Act of June 29, 1937, 50 Stat. 395, 411; see also, *e.g.,* 54 Stat. 546 (1940); 64 Stat. 666 (1950).

history." Instead, the legislative history of that Act accurately recounted that from the earliest days of the national forests, "the management of the national forests under the principle of multiple use has been thoroughly recognized and accepted." H.R. Rep. No. 1551, 86th Cong., 2d Sess. 2-3 (1960); S. Rep. No. 1407, 86th Cong., 2d Sess. 3 (1960).[8]

5. In view of the suggestions in the State's brief (Br. 7)—and particularly in light of the alarmist tone of several of the briefs of *amici curiae*—it is appropriate to note that the federal claim to reserved water rights in this case, as in other pending cases, is modest. According to statistics compiled by the Department of Agriculture, the national forests yield more than 200 million acre-feet of water per year. The federal government's reserved water claims for present and future consumptive uses in the national forests in the western states, if upheld by this Court, will not exceed one million acre-feet, or one half of one percent of that yield, and will probably be substantially less.[9] Moreover, in order to avoid any uncertainty about the future impact of federal reserved water rights claims, the government does not object to a final quantification of its reserved rights in this case and similar cases.

---

[8]In attacking the view of the national forests taken by Congress in the Multiple-Use Sustained-Yield Act of 1960, the State relies principally on the case of *West Virginia Division of the Izaak Walton League of America, Inc.* v. *Butz,* 522 F. 2d 945 (C.A. 4). That case is inapposite, as it stands for the proposition that the 1960 Act did not overrule the Organic Act of 1897. We have not made any such claim here, nor would any such contention be relevant to the issues in this case.

[9]A letter from the Chief of the Forest Service confirming this limit is attached as an appendix.

Under these circumstances, the arguments of the State and *amici* that the claims of the United States to reserved water rights in the national forests will unduly injure junior claimants who have depended on the availability of forest waters for their livelihood are not well founded.

For the reasons given here and in our main brief, the judgment of the Supreme Court of New Mexico should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1978.

DOJ-1978-04

APPENDIX

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE
P. O. Box 2417
Washington, DC 20013

April 19, 1978

Mr. James W. Moorman
Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Moorman:

I am pleased to provide you with the following information concerning National Forest System's consumptive water uses.

According to our most recent compilations for the six Western Regions of the National Forest System, the total yield of water from National Forest reserved lands amounts to 202,366,000 acre-feet.

We are currently seeking to determine a reliable figure for present and foreseeable National Forest water needs. The outside limit of that figure would not exceed one million acre-feet, an amount less than 0.5 percent of the total yield of those six Regions. Our preliminary estimates indicate that the figure may be substantially lower than that.

This is the limit of the total reserved water rights for consumptive uses the Forest Service will seek in water adjudications for the National Forest System in the six Western Regions.

Sincerely,

JOHN R. McGUIRE
Chief